

ZONING BOARD OF APPEALS

RECEIVED

SOMERS, CONNECTICUT
APPLICATION FOR HEARING

JUL 22 2020

\$360.00 NON-REFUNDABLE APPLICATION FEE
\$100.00 for each additional variance request.

BY: LAND USE DEPT.

Application Number: ZBA 20-009 Date July 22, 2020
Applicant James Patsun & Patsun Construction, Inc. Phone (860) 573-5570
Applicant E-mail jim@patsunconstruction.com; tregan@grsm.com (Todd R. Regan, attorney for Applicants)
Address 109 Franklin Woods Dr, Somers, CT 06071 / Gordon & Rees, 95 Glastonbury Blvd #206, Glastonbury, CT 06033
Location of Property 40 & 42 Hallie Ln, Somers, CT Zone A, A1 B I (CIRCLE)
Owner of Record Amy L. Eastman
Address 40 Hallie Ln, Somers, CT
Deed Reference Volume 284 Page 988 (42 Hallie Ln) Vol. 259 / Page 734 (40 Hallie Ln)
Reason for Variance Request Appeal of Cease and Desist Orders (example, side yard, height, front yard)
Decision Date _____ Decision _____ Sec _____ Par _____ Page _____

All applicants hereby certify that they are the _____ owner of record for the above referenced property or they are an appointed representative of the _____ owner of record with permission to act on behalf of the property owner. (Please check one) N/A This is an appeal of Cease and Desist Orders addressed to Applicants

All information above must be filled out prior to making application

Clearly state why you are requesting a variance for this property and explain what hardship exists/applies for this case. Also, please provide a pertinent sketch or blueprint of proposed variance.

The Applicants hereby appeal the Cease and Desist Orders, dated June 22, 2020, with respect to the two above-referenced properties, issued by Jennifer Roy, Somers Zoning Enforcement Officer, copies of which are attached. The Applicants are not seeking a variance. The Cease and Desist Orders contend that the work performed by Applicants at 40 Hallie Lane is in violation of the Zoning Regulations because it was performed without a Special Permit. With respect to the work at 42 Hallie Lane, the Cease and Desist Orders contend that the activities in question are not permitted under the Zoning Regulations. The Applicants respectfully disagree with the Town's current interpretations of the Zoning Regulations, which interpretations are contrary to the way in which the Regulations in question have been interpreted by the Zoning Commission and Zoning Enforcement Officer for many years. Contrary to the position stated in the Cease and Desist Orders, no Special Permit is required for the work in question on either property, because the activities are as of right. In further support of this Application, Applicants submit the attached legal opinion letter of Attorney Dwight Merriam (with supporting affidavits) who was retained by the property owner in connection with this matter.

Signature James Patsun

OFFICE USE ONLY

TOWN OF SOMERS
Office of Zoning Enforcement
600 Main Street
Somers, CT 06071

CEASE AND DESIST ORDER

June 22, 2020

VIA: State Marshal – in hand service

James M. Patsun, Sr.
109 Franklin Woods Drive
Somers, CT 06071

SUBJECT ADDRESS: 40 and 42 Hallie Lane, Somers, CT

Dear Mr. Patsun,

Please be advised that you are found to be in violation of the Town of Somers zoning regulations.
ZONING REGULATION(s) VIOLATION(s):

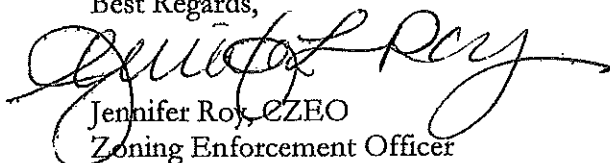
You are hereby notified that I am issuing a Cease and Desist order to you for violating Article XII Sections 214-66 et seq. of the Town of Somers Zoning Regulations (Regulations) in that you have conducted excavation, removal and filling of earth materials operations on 40 Hallie Lane, Somers without a Special Permit as required by that Article and under Sections 214-98 and 214-102 of the Regulations. You are also violating these same sections of the Regulations as to 42 Hallie Lane, Somers in that earth materials are being excavated and/or removed from or deposited onto 42 Hallie Lane where such activity is not permitted under the Regulations.

You are hereby ordered to cease and desist the activity identified as a zoning violation upon receipt of this Order. Your failure to do so will result in further enforcement action. Connecticut General Statute Sec. 8-12 authorizes the institution of a lawsuit to enforce the zoning regulations and provides for the assessment of fines, penalties and costs.

You may appeal this Order to the Somers Zoning Board of Appeals in accordance with Section 8-7 of the Connecticut General Statutes. The appeal shall be filed with the ZBA in the Land Use Office located in Town Hall, 600 Main Street, Somers, CT. The appeal shall be filed no later than **30 days** after your receipt of this Order. Failure to appeal this Order or correct the violation within the timeframe prescribed herein will result in the referral of this matter to the Town Attorney for legal action.

Should you wish to discuss this matter in more detail, please contact the Land Use Office directly.

Best Regards,


Jennifer Roy, CZEO
Zoning Enforcement Officer

TRUE COPY ATTEST:

SHARON UHLMAN
STATE MARSHAL
TOLLAND COUNTY

TOWN OF SOMERS
Office of Zoning Enforcement
600 Main Street
Somers, CT 06071

CEASE AND DESIST ORDER

June 22, 2020

VIA: State Marshal – in hand service

Patsun Construction Inc.
109 Franklin Woods Drive
Somers, CT 06071

SUBJECT ADDRESS: 40 and 42 Hallie Lane, Somers, CT

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ZONING REGULATION(s) VIOLATION(s):

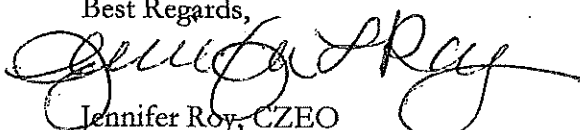
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You are hereby ordered to cease and desist the activity identified as a zoning violation upon receipt of this Order. Your failure to do so will result in further enforcement action. Connecticut General Statute Sec. 8-12 authorizes the institution of a lawsuit to enforce the zoning regulations and provides for the assessment of fines, penalties and costs.

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Should you wish to discuss this matter in more detail, please contact the Land Use Office directly.

Best Regards,


Jennifer Roy, CZEO
Zoning Enforcement Officer

TRUE COPY ATTEST:

SHARON UHLMAN
STATE MARSHAL
TOLLAND COUNTY

DWIGHT MERRIAM
Attorney at Law
80 Latimer Lane
Weatogue, Connecticut 06089
dwightmerriam@gmail.com
860-651-7077

April 29, 2020

John H. Parks, Esq.
Law Office of John H. Parks
352a Billings Rd
Somers, CT 06071-2022

Re: Amy Eastman, 40 and 42 Hallie Lane, Somers, Connecticut,

Dear John:

On behalf of your client, Amy Eastland, owner of the above-referenced lots ("40 Hallie" and "42 Hallie"), you have requested my review of the Town of Somers Zoning Regulations ("Regulations") to determine what permits are required pursuant to the Regulations to excavate rock and soil on 40 Hallie and 42 Hallie, where the rock and soil are not removed from either one of the lots, but are retained and utilized in sculpting the landscape and constructing stone walls. As part of this review, you have asked me to comment on the opinion by Somers Town Attorney Carl Landolina, dated February 11, 2020 ("Town Attorney's Opinion Letter").

This is a limited opinion in that it is restricted to a review of the Regulations, Connecticut case law, and the pattern and practice in the Town of Somers with regard the excavation of rock and soil, in the context in part of the Town Attorney's Opinion Letter.

I express no opinion as to what permits and approvals are required if blasting is used. I also express no opinion as to inland wetlands and watercourses. I note that you have informed me that no wetlands approval is required as all of the proposed activity is outside of regulated wetlands and watercourses and associated upland review areas and that appropriate soil erosion and sedimentation controls have been designed by a registered civil engineer and will be implemented.

Background

It is proposed to break up rock outcrops at 40 Hallie and 42 Hallie through mechanical means or by blasting and to independently regrade the two lots with the broken rock and other soil excavated in the process of breaking up the rock. It is estimated that over 1,000 cubic yards of earth products will be excavated and regraded on each of the two lots. 42 Hallie is approximately 40 acres and has the largest area of rock outcrop, a substantial portion of which would be used to construct stone walls on the property typical of the historic farming landscape in Somers. The same work would be undertaken at 40 Hallie. The regrading on both lots is in

support of plans to ultimately construct as-of-right accessory uses. 40 Hallie is in the Residential A-1 Zone and 42 Hallie is in the Residential A Zone.

In the summer of 2019, the Town of Somers Zoning Enforcement Officer ("ZEO") issued a cease and desist order alleging that the breaking up of the rock outcrop and retention of the material on-site either required certain zoning approvals, specifically a Special Use Permit ("SUP") (40 Hallie), or was wholly prohibited (42 Hallie). The ZEO later withdrew the cease and desist order for reasons not relevant to this opinion.

The Regulations

Relevant Provisions

§ 214-4 Definitions.

For the purposes of these regulations, the terms, phrases and words listed below have the meanings thereafter stated:

ACCESSORY BUILDING OR STRUCTURE

A supplemental building or structure, the use of which is subordinate or incidental to that of the principal building or structure and which is located on the same lot or a contiguous lot under the same ownership.

ACCESSORY USE

A use of land, or of all or a portion of a building or structure, which is subordinate or incidental to the principal use of the land, building or structure and which is located on the same lot as the principal use or on a contiguous lot under the same ownership.

EARTH REMOVAL

Removal of any kind of soil or earth matter, including topsoil, sand, gravel, clay, rock or similar material, or combinations thereof.

Article VI Accessory Uses

§ 214-38 Use; location; height regulations.

- A. Accessory structures customarily incidental to any use permitted herein are allowed, provided that such accessory structures shall not include any advertising signs, signboards or posters, except for small announcement signs or a farm name as provided under §§ 214-57 and 214-58.
- B. An accessory building, including those attached to a main building by means of a breezeway or a roofed passageway or other connection, shall not be used for residential purposes, except as specifically provided elsewhere in these regulations.
- C. A barn, stable or garage may be erected to the same height limits as the main building.

- D. Accessory buildings on a residential lot may include private garages in which not more than one space may be occupied by a commercial vehicle.

Article XII Earth Removal and Filling

§ 214-66 Purpose.

The purposes of this article are to preserve a cover crop on the land, to prevent erosion and to control any excavation or filling operations that may create a safety or health hazard to the public or the nearby property owners or be detrimental to the immediate neighborhood or to the Town of Somers.

§ 214-67 Special use permit required.

No excavation or removal of sand, gravel, clay, soil, humus, quarry-stone, rock or other earth materials and no filling of land shall be allowed in any zone without a special use permit, except as hereafter provided.

§ 214-68 Exemptions.

A special use permit shall not be required for the necessary and incidental excavation or removal of 1,000 cubic yards or less of material on or from a lot or parcel, or for any filling activity, only if such activity occurs in connection with one of the following:

- A. A bona fide construction or alteration of a structure for which a zoning permit or special use permit has been issued and the amount of material to be removed or filled has been approved by the Commission. Topsoil or loam may only be removed to the extent necessary to allow permitted building or other construction activities. Such topsoil or loam shall be retained on the property and shall be respread on the property following the completion of construction activities. Such topsoil and loam shall then be reseeded or otherwise stabilized to prevent erosion. Topsoil or loam may be removed from the property only if the applicant demonstrates to the Zoning Commission that such materials cannot be practically reused on the property.
- B. The landscaping of a lot having one or more existing structures. ...
- E. A bonded or otherwise secured subdivision approved by the Planning Commission.

§ 214-98 Area, yard and bulk regulations; permitted uses and accessory uses.

- B. Schedule of Permitted Uses.

Schedule of Permitted Uses

Primary Uses

Districts

A A-1 B I

Schedule of Permitted Uses

Primary Uses		Districts			
7.	Removal of earth products	N	SU	SU	SU

C. Schedule of Permitted Accessory Uses.

Schedule of Permitted Accessory Uses

Permitted Accessory Uses		Districts			
		A	A-1	B	I
15.	Accessory uses and structures in accordance with § 214-4, Article VI, §§ 214-92 and 214-93 and this section	X	X	X	X

Interpretation of the Regulations

A fair reading of the Regulations requires defining terms not expressly defined: excavation, removal, and filling. The meaning of these terms is determined by the use in context and how the Zoning Commission ("Commission") and ZEO have applied them. Case law in Connecticut and elsewhere is not particularly helpful. Dictionary definitions may aid in determining common meaning.

"Excavation" is defined by Merriam-Webster to include "to dig out and remove." "Remove," again turning to Merriam-Webster, connotes taking away: "to change the location, position, station, or residence of" and "to move by lifting, pushing aside, or taking away or off." To dig out rock and soil is to excavate but excavate also includes removal and removal requires that the material be taken away. It is not "taken away" under the facts of this activity because it remains on the lot.

"Filling" is defined to describe, again following Merriam-Webster, "something used to fill a cavity, container, or depression." Sculpting the landscape to prepare it for the placement of permitted accessory structures, such as stone walls and outbuildings, including barns, is not filling a cavity.

Where the Town Attorney's Opinion Letter misses the mark in applying these commonly-held definitions is in the context of the regulatory scheme itself.

First, § 214-98.B.7 "Removal of Earth Products" can only mean an excavation leading to the transport of materials off-site. The provision does not apply to the proposed activity at either 40 Hallie or 42 Hallie because there is no removal and in both instances the work is an integral part of undertaking one or more of the enumerated accessory uses allowed as-of-right, namely, preparing the landscaping by sculpting to enable construction of accessory structures. Consequently, it is my opinion that this section does not apply to the proposed activity of rock and soil excavation on both 40 Hallie and 42 Hallie.

The Town Attorney's Opinion Letter concludes that there can be no excavation on 42 Hallie, even with a Special Use Permit, as he argues is required for 40 Hallie, because "Removal of Earth Products" is not a permitted use.

The Town Attorney's Opinion Letter states that Article XII is controlling. Article XII includes:

§ 214-67 Special use permit required.

No excavation or removal of sand, gravel, clay, soil, humus, quarry-stone, rock or other earth materials and no filling of land shall be allowed in any zone without a special use permit, except as hereafter provided.

The "hereafter provided" is a 1,000 cubic yard exemption from the Article XII Special Use Permit ("SUP") requirement only. The Town Attorney's Opinion Letter makes this clear in stating that: "Specific language as to how each use is regulated is found in the *particular* sections regulating those uses." (emphasis added).

The 1,000 cubic yard exemption is not a general exception from the rest of all of the requirements of the Regulations. It only applies, in the view of the Town Attorney's Opinion Letter, to Article XII. Pursuant to § 214-98.B.7, an SUP is not permitted for any "Removal of Earth Products" in the Residential A Zone. The Town Attorney's Opinion Letter equates the excavation referred to in § 214-67 "No excavation or removal" with § 214-98.B.7 "Removal of Earth Products." They are one and the same in the Town Attorney's Opinion Letter: excavation and removal and filling are all part of any activity that involves any movement of earth products.

This conclusion is facially untenable because it would not permit rock and soil in any amount to be excavated in the Residential A Zone under any conditions. This logically cannot be true. The illustration, *argumentum ad absurdum*, is that a homeowner who digs a post hole in the Residential A Zone violates the Regulations. Because the Town Attorney's Opinion Letter states that Article XII controls, there is no potential exemption from the SUP that is not permitted regardless in the Residential A Zone, even for excavation, removal, and filling under 1,000 cubic yards.

Second, if it does not apply to the excavation of earth products in the Residential A Zone where the work is either in furtherance of initial construction or subsequent improvements after-

the-fact, e.g. as-of-right accessory uses, then it does not apply in the Residential A-1 Zone either, where the excavated material is retained on-site.

The only way that § 214-98.B.7 "Removal of Earth Products" makes sense is if the principal use is the mining of earth products for transport and sale off-site. If it were otherwise, the same Special Use Permit requirement and exemptions would necessarily apply in all zones.

Sculpting of the landscape with excavated earth products originating on site is not filling, especially so under the facts of 40 Hallie and 43 Hallie where there are no cavities being filled and the rock will be used for stone walls.

Finally, Article XII Earth Removal and Filling, § 214-66 Purpose, is precatory and in no way controlling in defining the subsequent terminology used and applied in the regulatory provisions.

Estoppel

Case law in Connecticut and nationally is unhelpful to both the Town and the property owner in interpreting these definitions and the Regulations. Common dictionary definitions give some indication of what they should mean. In this instance, however, we fortunately have overwhelming, compelling, and incontrovertible evidence of what the definitions mean and how they are interpreted by the Commission and ZEO and applied under the Regulations.

Enclosed with this opinion are affidavits of a civil engineer and a former Somers town planner. Their sworn statements are based on a combined experience in town of more than half a century. They describe the scores and perhaps hundreds of individual lots and numerous developments over many years where the Commission and the ZEO have consistently treated excavation, removal, and filling of over 1,000 cubic yards on individual lots as unregulated activities, where the material has been retained on the lots.

This pattern and practice not only adds meaning to the definitions and their use in the Regulations, but it makes sense in the regulatory scheme intended to address mining for profit and massive undertakings involving large volumes of material hauled into sites and removed over town highways in caravans of large dump trucks.

My opinion, based on the enclosed sworn statements and the common law of equitable estoppel in zoning in Connecticut, See e.g., *West Hartford v. Rechel*, 190 Conn. 114; 459 A.2d 1015 (1983) (municipality could be estopped from enforcing its zoning regulations because of a long-standing pattern of unchallenged conduct), is that the ZEO is estopped from requiring any zoning approval of the proposed excavation, removal, and filling on 40 Hallie and 42 Hallie because the longstanding pattern and practice has been to allow such activities to be conducted as-of-right.

And even if the formal requirements for equitable zoning estoppel were not met, though I believe they are readily demonstrated, the pattern and practice followed by the Commission and ZEO serve to define the otherwise-not-defined terms that some might argue are ambiguous. In

short, my opinion is that "excavation" does not include breaking up rock and digging up soil if the material remains on the site. "Removal," in my opinion based on this pattern and practice, only refers to rock and soil taken from the site, not material remaining on the property. Finally, "filling," in my opinion, means to place rock and soil in evident holes and in below-grade depressions of some depth, and does not include sculpting for further development of a site, where no material is brought in from elsewhere.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dwight Merriam".

Dwight Merriam

Enclosures

STATE OF CONNECTICUT)
COUNTY OF TOLLAND) ss.
TOWN OF SOMERS)

APRIL 24, 2020

AFFIDAVIT

COMES NOW Patrice Carson being first duly sworn, under oath, and states that the following information is within her personal knowledge and belief:

1. I was the first Town Planner in the Town of Somers, Connecticut.
2. My resume includes the following:
 - a. Bachelor of Arts in Geography/Urban Studies-University of Connecticut
 - b. Managers in Government – University of Connecticut
 - c. American Institute of Certified Planners
 - d. Connecticut Association of Zoning Enforcement Officials
 - e. Connecticut Chapter of the American Planning Association
 - f. International City/County Management Association
 - g. Town of Somers Planning Department
 - h. Town of Coventry Planning Department
 - i. Pioneer Valley Regional Planning Commission
3. I was the Town Planner in Somers from September 1987 through June 2009.
4. As the Town Planner my work entailed, among other things, reviewing subdivision applications with:
 - a. The Somers Town Engineer
 - b. The Somers Town Attorney
 - c. The Somers Zoning Enforcement Officer
 - d. The Somers Wetland Enforcement Officer
 - e. The Somers Town Sanitarian
 - f. The Somers Planning Commission
 - g. The Somers Zoning Commission
 - h. The Somers Wetlands Commission
 - i. The Somers Zoning Board of Appeals
 - j. Various town officials
 - k. Various county and state officials
 - l. Various local developers and builders
 - m. Subdivision applicants
 - n. Subdivision applicants' surveyors
 - o. Subdivision applicants' engineers

- p. Subdivision applicants' soil scientists
- q. Subdivision applicants' attorneys

5. As Town Planner I became knowledgeable of:

- a. Somers Zoning Regulations
- b. Somers Subdivision Regulations
- c. Somers Inland Wetland Regulations
- d. Various land use state statutes
- e. Various land use regulations
- f. Various land use cases
- g. Various land surveying laws, terms and functions
- h. Reading and understanding survey plans
- i. Reading and understanding engineering plans
- j. Reading and understanding wetlands plans
- k. Blasting contractors
- l. Requirements relative to blasting of various types of ledge and rock relative to subdivision construction
- m. Local landscaping projects
- n. Field visits to subdivision construction sites
- o. Town Attorney opinions issued regarding the interpretation of the Somers Zoning Regulations in a variety of situations

7. For the majority of the time I was Town Planner, I also was a resident of the Town of Somers. After 2009 I continued to be a resident of the Town of Somers and I am a resident of the Town of Somers to this day.

8. In my capacity as Town Planner, I became familiar with ARTICLE XII of the Somers Zoning Regulations, §§ 214-66 to 214-76.

9. During my tenure as Town Planner, I attended the Somers Zoning Commission meetings.

10. During my tenure as Town Planner, the Staff of the Land Use Department as well as the members of the Somers Zoning Commission referred to Special Use Permits issued pursuant § 214-67 as Gravel Permits and the regulation of Gravel Permits was the only time that section of the Somers Zoning Regulations was used.

11. During my tenure as Town Planner, I attended and/or was involved in all of the Gravel Permits granted during that time period.

12. I am aware that some of the Gravel Permits granted during my tenure as Town Planner continued to have their Gravel Permits renewed by the Somers Zoning Commission utilizing the same permitting procedures that were in place during the time I was Town Planner.

13. I am aware of examples of earth excavation allowed by the Town of Somers that involved excavation or removal of more than 1,000 cubic yards of material on the lot or parcel that were not required to obtain Special Use Permits pursuant to § 214-67, because they were not gravel mining operations.

14. I have reviewed the Legal Opinion dated February 11, 2020, prepared by the Somers Town Attorney relative to §§ 214-4, 38, 66, 67, 68, 98 of the Somers Zoning Regulations.

15. During my tenure as Town Planner, neither the Somers Town Attorney, the Land Use Staff nor the Somers Zoning Commission ever applied the sections of Article XII in the manner or situation expressed in the February 11, 2020 Legal Opinion.

16. In the 22 years I served as Town Planner, I was also familiar with § 214-68 E of the Somers Zoning Regulations.

17. In the 22 years I was Town Planner, I was aware of more than 40 subdivisions approved by the Town of Somers Planning Commission.

18. None of the subdivisions the Planning Commission approved in the 22 years I was Town Planner were required to obtain Special Use Permits from the Somers Zoning Commission for earth products, excavation, removal, or filling pursuant to any provision of the Somers Zoning and Subdivision Regulations, including §§ 214-67 & 68 E of the Zoning Regulations.

19. In my experience in Somers and elsewhere, 1,000 cubic yards is not a large volume of material to be excavated, removed, and filled for an average lot in connection with the construction and landscaping work typically involved in most subdivisions, especially if the subdivision plan included the construction of a road.


20. In the 22 years I was the Town Planner, the Somers Planning Commission never required any developer of a subdivision it approved to obtain a variance from the Zoning Board of Appeals to excavate, remove, or fill on a lot for any amount of rock and soil under any provision of the Somers Zoning Regulations, including §§ 214-68 E, where the material was retained on site.

21. The construction of many of the subdivisions approved by the Town of Somers Planning Commission in the 22 years I was Town Planner involved the excavation, removal, and filling of substantially more than 1,000 cubic yards of material.

22. If necessary, I can provide a much more detailed Affidavit specifying:

- a. Names of subdivisions
- b. Names of developers
- c. Names of parcels of property
- d. Names of surveyors
- e. Names of engineers

- f. Names of attorneys
- g. Names of town officials
- h. Names of subdivisions where blasting was done
- i. Calculations of cubic yards of rocks and soil excavated, removed, and filled in the 40, more or less, subdivisions approved by the Somers Planning Commission in the 22 years that I was Town Planner.



Patrice Carson

STATE OF CONNECTICUT)

) ss. Somers

April 24, 2020

COUNTY OF TOLLAND)

On this the 24th day of April, 2020, before me, John H. Parks, the undersigned officer, personally appeared, Patrice Carson, known to me to be the person who subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand.



John H. Parks
Commissioner of the Superior Court

STATE OF CONNECTICUT)
COUNTY OF TOLLAND) ss.
TOWN OF SOMERS)

APRIL 29, 2020

AFFIDAVIT

COMES NOW James E. Ussery, Jr., being first duly sworn, under oath, and states that the following information is within his personal knowledge and belief:

1. I am a Land Surveyor licensed to practice in the State of Connecticut since 1987.

2. My resume includes the following:

AAS, Paul Smiths College 1975, Forestry/Land Surveying
Licensed Land Surveyor State of Connecticut
Member National Society of Professional Surveyors
Tolland County Director, Connecticut Association of Land Surveyors

3. I am a member of J. R. Russo & Associates, LLC, which is a firm that employs Land Surveyors and Professional Engineers, with an office located at 1 Shoham Road, Suite 3 in East Windsor, Connecticut.

4. Part of my work as a Land Surveyor involves representing land owners involved in a variety of land use projects before various land use commissions, including but not limited to, Zoning Commissions, Planning Commissions, Planning and Zoning Commissions, and Inland Wetlands and Watercourse Commissions in Towns throughout the State of Connecticut.

5. Part of my work representing land owners before various land use commissions in Towns throughout the State of Connecticut requires me to become familiar with both local land use regulations as well as a number of state statutes and regulations governing land use in the State of Connecticut.

6. My work on land use projects in various Connecticut Towns requires reading and discussing with the staff of that Town's Land Use Staff and sometimes the Town's Attorney the application of the Town's Subdivision and Zoning Regulations regarding my client's proposed uses of their land in those towns.

7. During my career, I have represented land owners in the Town of Somers before the Town of Somers' Zoning Commission, Planning Commissions, and Conservation Commission serving as the Inland Wetlands and Watercourse Commission on a regular basis since 1988.

8. Amongst other land use projects, over the years, I have represented land owners in the Town of Somers in both applications for subdivisions as well as applications for Special Use Permits for Earth Removal and Filling pursuant to ARTICLE XII of the Somers Zoning Regulations, §§ 214-66 to 214-76.

9. As with land use projects in any of the Towns I work in, with my Town of Somers land use projects, over the years, I have discussed the land use projects I have worked on with the Land Use Staff in the Town of Somers.

10. While working on Special Use Permit Applications for Earth Removal and Filling pursuant to ARTICLE XII of the Somers Zoning Regulations, §§ 214-66 to 214-76, the Staff of the Somers Land Use Department as well as the members of the Somers Zoning Commission referred to Special Use Permits issued pursuant § 214-67 as Gravel Permits and in my experience, that was the only time that section of the Somers Zoning Regulations has ever been used.

11. In the Town of Somers, Gravel Permits need to be renewed every year.

12. One of the Gravel Permit applications that my firm worked on was the Wood Gravel Permit, which was approved by the Somers Zoning Commission under the Earth Removal and Filling provisions of the Somers Zoning Regulations in 1988.

13. My firm has continued to represent the Wood Gravel operation since it was approved in 1988, which means my firm has been before the Somers Zoning Commission every year since 1988, that is 32 times.

14. In preparation for and attendance at all of those Somers Zoning Commission meetings, the Somers Zoning Commission members as well as the Staff of the Somers Land Use Department has consistently referred to both the original Special Use Permit Applications for Earth Removal and Filling pursuant to ARTICLE XII of the Somers Zoning Regulations, §§ 214-66 to 214-76, as well as all of the renewals under those sections as Gravel Permits applications and Gravel Permit renewals.

15. Many times when the Town of Somers Zoning Commission would schedule the renewal application for the Wood Gravel operation, it would schedule the renewal applications for the other gravel operations located in the Town of Somers for the same night. As a result, when I appeared before the Zoning Commission for my client's renewals, I witnessed the way the Zoning Commission handled all of the other gravel operations in the Town of Somers. The Somers Zoning Commission and Land Use Staff handled the other local gravel operations in the same manner they handled the Wood Gravel Permits and Renewals thereof.

16. I am aware of examples of earth excavation allowed by the Town of Somers that involved excavation or removal of more than 1,000 cubic yards of material on the lot or parcel that were not required to obtain Special Use Permits pursuant to § 214-67, because they were not gravel mining operations.

17. I have reviewed the Legal Opinion dated February 11, 2020, prepared by the Somers Town Attorney relative to §§ 214-4, 38, 66, 67, 68, 98 of the Somers Zoning Regulations.

18. The Town of Somers has had the same Town Attorney since the early 1990's.

19. In all of my work representing land owners in the Town of Somers concerning Earth Removal and Filling under the Somers Zoning Regulations, neither the Somers Town Attorney, the Land Use Staff nor the Somers Zoning Commission ever applied the sections of Article XII in the manner or situation expressed in the February 11, 2020 Legal Opinion.

20. In the 32 years I have worked representing land owners in the Town of Somers concerning subdivisions of their land, I was also familiar with § 214-68 E of the Somers Zoning Regulations.

21. In the 32 years I represented land owners in the Town of Somers concerning the subdivision of their land, I was aware of numerous subdivisions approved by the Town of Somers Planning Commission.

22. As far as I am aware none of the subdivisions the Planning Commission approved in the 32 years I have represented land owners in the Town of Somers concerning subdivisions of their land were required to obtain Special Use Permits from the Somers Zoning Commission for earth products, excavation, removal, or filling pursuant to any provision of the Somers Zoning and Subdivision Regulations, including §§ 214-67 & 68 E of the Zoning Regulations.

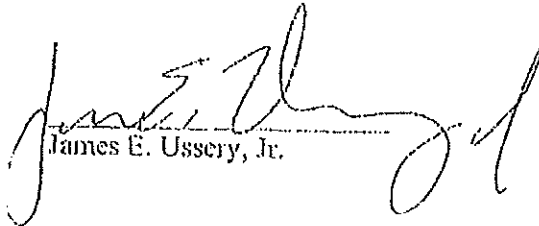
23. In my experience in Somers and elsewhere, 1,000 cubic yards is not a large volume of material to be excavated, removed, and filled for an average lot in connection with the construction and landscaping work typically involved in most subdivisions, especially if the subdivision plan included the construction of a road.

24. In the 32 years I have represented land owners in the Town of Somers concerning the subdivision of their land, the Somers Planning Commission has never required any of my developer clients of a subdivision it approved to obtain a variance from the Zoning Board of Appeals to excavate, remove, or fill on a lot for any amount of rock and soil under any provision of the Somers Zoning Regulations, including §§ 214-68 E, where the material was retained on site.

25. The construction of many of the subdivisions approved by the Town of Somers Planning Commission in the 32 years I represented land owners in the Town of Somers concerning the subdivision of their land involved the excavation, removal, and filling of substantially more than 1,000 cubic yards of material.

26. If necessary, I can provide a much more detailed Affidavit specifying:

- a. Names of subdivisions
- b. Names of developers
- c. Names of parcels of property
- d. Names of surveyors
- e. Names of engineers
- f. Names of attorneys
- g. Names of town officials
- h. Names of subdivisions where blasting was done
- i. Calculations of cubic yards of rocks and soil excavated, removed, and filled in the subdivisions I have been involved in over the 32 years I have represented land owners in the Town of Somers concerning the subdivision of their land.


James E. Ussery, Jr.

STATE OF CONNECTICUT)

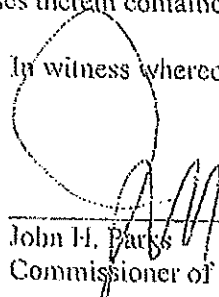
) ss. Somers

April 29, 2020

COUNTY OF TOLLAND)

On this the 29th day of April, 2020, before me, John H. Parks, the undersigned officer, personally appeared, James E. Ussery, Jr., known to me to be the person who subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand.



John H. Parks
Commissioner of the Superior Court